SUPREME COURT, U. S.
FILED
JAN 17 1972
E. ROBERT SEAVER, CLERK

No. 71-838

# In the Supreme Court of the United States

OCTOBER TERM, 1971

PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM AND MICHAEL PADEV,
*Appellants,*

v.

WADE CHURCH,
*Appellee.*

On Appeal From The Superior Court of the State of Arizona in and for the County of Maricopa and the Arizona Supreme Court

## MOTION TO DISMISS OR AFFIRM

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On Appeal From The Superior Court of the State of Arizona in and for the County of Maricopa and the Arizona Supreme Court

## MOTION TO DISMISS OR AFFIRM

Appellee moves this Court to dismiss the appeal or alternatively to affirm the trial and post trial rulings of the Superior Court of Maricopa County, Arizona, and the order of the Arizona Supreme Court on the following grounds:

I. The appeal is not within the jurisdiction of this Court.

II. The appeal does not present a substantial federal question.

III. The questions truly raised are so insubstantial as to not require further argument.

## I.

## THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT

Appellants invoke jurisdiction of this Court under 28 U.S.C. § 1257 which grants jurisdiction of an appeal from a final judgment or decree:

> ". . .: where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellants' attempt to meet this requirement is contrived.

Appellants' real complaint is that the Arizona Superior Court (trial court) denied a trial motion for a directed verdict and a post-trial motion for judgment notwithstanding the verdict. To attempt to meet the quoted statute, Appellants assert that the refusal of the Arizona Supreme Court to review these rulings by a "Special Action," drew into question the constitutionality of two Arizona Rules of Civil Procedure which are in all pertinent respects identical to Rules 50(a) and 50(b) of the Federal Rules of Civil Procedure promulgated by this Court.[1]

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[1] Rule 50(a) of the Arizona Rules of Civil Procedure provides:

"A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence, in the event the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor."

Rule 50(b) of the Arizona Rules of Civil Procedure provides:

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not

Neither the Arizona Superior Court nor the Supreme Court of Arizona ruled on the constitutionality of these two procedural rules, nor was their constitutionality in any respect drawn into question..

The instant case in the Arizona Superior Court was the second trial of a libel action which the Arizona Supreme Court determined had to be retried[2] to give effect to the principles of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964).

When Appellants lost for the second time, they decided to short-circuit the appellate procedures of the Arizona courts and attempt a direct appeal from the trial court to this Court.

A direct appeal from the trial court to this Court, without more, would have been too obviously not an appeal from a "final judgment or decree."

To conceal this deficiency, Appellants resorted to a Special Action under the Arizona Rules of Procedure for Special Actions, which was certain to be denied out of hand.[3] This was done in

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returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

The "Historical Note" following both Arizona rules indicates their source as Rules 50(a) and 50(b) F.R.C.P. Rule 50(b) F.R.C.P. and Rule 50(b) A.R.C.P. are identical in language. Rule 50(a) F.R.C.P. and Rule 50(a) A.R.C.P. are likewise identical in language except that the Arizona rule omits the last sentence contained in Rule 50(a) F.R.C.P., to wit:

"The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

[2] Phoenix Newspapers, Inc. et al v. Church, 103 Ariz. 582, 447 P.2d 840 (1968)

[3] The Arizona Supreme Court entered the following order appearing in 17 A.R.S. Anno. (Cumulative Pocket Part — West Publishing Co.):

spite of Appellants' right of appeal established by Title 12, Chapter 12, Article 1, of the Arizona Revised Statutes as amended Laws 1964.[4]

Appellants had every reason to be aware of the inapplicability of a Special Action to their situation. Rule 1 of the Arizona Rules of Procedure for Special Actions adopts the scope of relief traditionally granted under the historic writs of certiorari, mandamus and prohibition.[5] These traditional writs as applied in the State

"It is ordered that "Rules of Procedure for Special Actions — [Extraordinary Writs — Certiorari, Mandamus, Prohibition], hereto annexed, be, and it hereby is, promulgated to take effect on and after the 1st day of January, 1970."

[4] § 12-2101A A.R.S. provides that:

"An appeal may be taken to the Court of Appeals from the Superior Court in the instances specified in this section."

§ 12-2101C A.R.S. permits an appeal "from any special order made after final judgment." § 12-2101F, Sub. 1, permits an appeal "granting or refusing a new trial."

[5] Rule 1, captioned "Nature of the Special Action," provides:

"(a). Relief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule, and any reference in any statute or rule to any of these writs, unless excepted in the next subsection, shall be deemed to refer to the special action authorized under this Rule. Special forms and proceedings for these writs are replaced by the special action provided by this Rule, and designation of the proceedings as certiorari, mandamus, or prohibition is neither necessary nor proper. Except as authorized by statute, the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal; and nothing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus and prohibition.

"(b) Where a statute expressly authorizes proceedings under certiorari, mandamus, or prohibition, the proceedings shall be known as a statutory special action, as distinguished from those applications for writs of certiorari, mandamus, or prohibition, originating under A.R.S. §§ 12-2001, 12-2029, or the common law, which are special actions: Where a statutory special action is involved, the questions to be raised and considered are wholly unaffected by this Rule, but the provisions of this Rule as to parties, procedure, interlocutory orders and stays, and judgments shall apply."

of Arizona concern themselves with the "jurisdiction" of an inferior tribunal or administrative agency. The object of the writs was to prevent a (1) usurpation of jurisdiction or (2) an attemped assumption of jurisdiction where no such power or authority existed. *Sanford v. District of Pima County,* 8 Ariz. 256, 71 P. 906 (1903). *Peterson v. Jacobson,* 2 Ariz. App. 593, 411 P.2d 31 (1966). *Reid v. Ford,* 73 Ariz. 190, 239 P.2d 1079 (1952). *Hazard v. Superior Court,* 82 Ariz 211, 310 P.2d 830 (1957).

On January 1, 1970, the Arizona Supreme Court proposed to combine the traditional writs of certiorari, mandamus and prohibition into one proceeding to be known as "Special Action," eliminating confusion as to the proper lines of demarcation between the traditional writs.[6] Accordingly, the office of the new "Special Action," just as that of the traditional writs, is to test the propriety of a lower tribunal's exercise of jurisdiction. All that the Arizona Supreme Court determined on November 16, 1971, in its order declining to accept the petition for a Special Action was that the Superior Court of Maricopa County had "jurisdiction" over the parties, the subject matter, and that the trial court had the power to grant or deny the motions for a directed verdict and for judgment notwithstanding the verdict.

Most emphatically, the Arizona Supreme Court did not consider, and had no reason to consider, any question of whether or not the rules of procedure applicable to Appellants' motion were in violation of the Federal Constitution.

We are compelled to comment upon an assertion at Page 5 of

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[6] The State Bar Committee Note — 1969 — following Rule 1 for Special Actions in Arizona explains that:

> "This Rule proposes to combine the traditional writs of certiorari, mandamus and prohibition into one proceeding to be known as a 'special action.' The Rule is necessitated by the existing confusion as to the proper lines between these various writs, and by lack of a simple procedure which can be followed by all members of the bar and by the judiciary."

Appellants' Jurisdictional Statement. They say, as to the Special Action:

> "The thrust of the response of appellee *and the only point* presented on oral argument on the petition was that the 'law of case' was dispositive of appellants' position for a reappraisal of the evidence by the Arizona Supreme Court." (Emphasis supplied).

This statement, unsupported by any citation, is incorrect.

The written and oral thrust of Appellee's presentation before the Arizona Supreme Court was that (1) Appellants' writ could not supercede an appeal, and (2) the trial court had jurisdiction and the power to grant or deny Appellants' motions for directed verdict and for judgment notwithstanding the verdict.[7]

This Court has previously held jurisdiction lacking where a petitioner made a comparable attempt to short-circuit normal appellate procedures. In *Hammerstein v. Superior Court of California,* 341 U.S. 491, 71 S.Ct. 820 (1951), an appeal was attempted from the California Supreme Court's refusal to grant a Writ of Certiorari to review a default judgment entered by a California trial court. The California Supreme Court determined that the petitioner had failed to utilize the proper channels of review by not appealing from the judgment entered in the lower tribunal and that the California Supreme Court had no jurisdiction on certiorari.

This Court dismissed the appeal on grounds that no federal question was involved in the California determination.

In the case here at bar, this Court lacks jurisdiction for the further reason that the determination of the Arizona Supreme

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[7] Appellee's written response to Appellants' Special Action is a matter of record in this Court. Appellee in his oral presentation, as well as in his written response to the Arizona Supreme Court argued that (1) Appellants had an adequate remedy of appeal, (2) the office of a Special Action was limited to an appellate determination of whether the trial court had jurisdiction to pass upon Appellants' motions for directed verdict and judgment notwithstanding the verdict; and since such jurisdiction was present in the trial court, a Special Action would not lie.

Court was not a "final judgment or decree." This is a prerequisite to this Court's jurisdiction, whether by appeal or writ of certiorari under 28 U.S.C., Section 1257.

The determination of the Arizona Supreme Court clearly does not qualify as a "final judgment" as that term has been construed by this Court. In *Market Street Railway Co. v. Railroad Commission*, 324 U.S. 548, 65 S.Ct. 770 (1945) Reh. Den. 324 U.S. 890, 65 S.Ct. 1020, this Court said:

> "Final it must be in two senses: (1) it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." (65 S.Ct. 773)

It is also to be noted that, in their haste to reach this Court, Appellants neglected the steps best calculated to obtain speedy appellate review on the merits. They delayed filing their Notice of Appeal to the Arizona Supreme Court to almost the last moment and made no effort to seek an expedited hearing.[8] Appel-

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[8] Arizona Supreme Court Rule 2 provides:

> "When a writ of certiorari is applied for under the provisions of A.R.S. § 23-951, the court may issue the writ commanding the industrial commission to certify its proceedings and make return thereof within ten days. The petitioner shall file his brief within twenty days of the return day and the respondent shall file the answering brief within twenty days thereafter. The petitioner shall have ten days after the filing of respondent's brief in which to reply. No enlargement of the time for such filings shall be granted any party except on written application to the court for good cause shown. The matter shall then be deemed submitted, unless either party requests oral argument, whereupon the proceedings shall be set for hearing at the next call of the calendar, and shall take precedence over all civil cases except matters of general public interest, election cases, and those involving or affecting the corporation commission."

In 5 Arizona Law Review 175 former Chief Justice Charles Bernstein of the Supreme Court of Arizona, in an article entitled "The Disposition of Civil Appeals in the Supreme Court," made the following comment at Page 185 thereof, regarding preference or advancement made pursuant to Rule 2:

> "Certain types of cases are advanced toward final disposition as a

lants' Notice of Appeal to the Arizona Supreme Court, to which Appellants make no reference, was filed in the Superior Court of Maricopa County on December 2, 1971.[9] Appellants omitted to place or discuss this Notice of Appeal in their Jurisdictional Statement.

The result of Appellants' procedural maneuverings is the paradox that the rulings of the trial judge are now pending appellate review in two courts of last resort.

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result of the rules of the Court. By Rule 16, criminal appeals are given precedence over all civil matters, and by Rule 2, Industrial Commission cases are automatically given precendence over most other types of civil cases. Rule 2 further indicates that civil cases of general public interest, election cases and those involving or affecting the Corporation Commission are to be given preference. Cases in these last-mentioned categories are not automatically placed at the head of the list, however, but are given precedence only upon motion of counsel. Such motions are considered and decided at the regular Tuesday conferences, and oral arguments on these motions are not generally permitted. The decision as to whether a particular case is of general public interest is based upon a showing that the decision will affect the interests of a substantial segment of our citizens. Occasionally a case will be advanced when circumstances of unusual hardship resulting from delay are shown."

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[9] On December 2, 1971, Appellants, in compliance with Rules 73(a) and (d) of the Arizona Rules of Civil Procedure, filed a Notice of Appeal to the Supreme Court of the State of Arizona and a Cost Bond on Appeal. The text of Appellants' Notice of Appeal is reproduced as follows:

"NOTICE is hereby given that PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and MICHAEL A. PADEV, the above-named appellants (defendants), appeal to the Supreme Court of the State of Arizona from the judgment entered in the above cause in favor of WADE CHURCH and against PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and MICHAEL PADEV, on the 21st day of June, 1971, in the sum of TWO HUNDRED FIFTY THOUSAND and no/100 DOLLARS ($250,000.00) actual damages, and the sum of TWO HUNDRED THIRTY FIVE THOUSAND and no/100 DOLLARS ($235,000.00), punitive damages, and *from the order denying appellants' Motion for a New Trial and Motion for Judgment Notwithstanding the Verdict*, entered October 8, 1971, and from the whole thereof." (Emphasis supplied).

II.

## THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

By short-circuiting the appellate procedures available in Arizona, Appellants bring to this Court a contrived and ridiculous challenge to the constitutionality of the rules of trial procedure prescribed by this Court.

At the same time, the question really troubling the Appellants — the application of *New York Times v. Sullivan* to the facts they claim were newly made of record at the retrial — would remain undetermined by any Arizona appellate court.

Appellants assert that the Arizona Supreme Court has refused to follow this Court's pronouncement in *New York Times v. Sullivan*, supra. The contrary is the fact. One need but scan the opinion in *Phoenix Newspapers, Inc. vs. Church*, set forth verbatim in the Appendix to Appellants' Jurisdictional Statement at Pages 5 to 52, inclusive, and particularly, Pages 18, 19, 20, 21, 22, 23, 24, 31, 35 and 36, to find the care with which the Arizona Supreme Court analyzed and applied the Times' opinion and the cases decided by this Court in its wake.

There is no reason to doubt that the Arizona Supreme Court, were this case permitted to pursue a conventional appellate course, would, with equal care, analyze and apply decisions subsequent to the *Times'* case to the facts presented during the second trial.

In the retrial, the trial judge was naturally bound by the law of the case established by the Arizona Supreme Court's first decision. As the Appellants concede (P.6) "only the Arizona Supreme Court had the power to review its early holding rendered on a previous trial of the same case."

This case can scarcely be regarded as presenting a substantial federal question when the only Arizona court which can rule on the issues involved has not had an opportunity to reappraise the

facts elicited at the second trial against the present state of the law.

## III.

## THE QUESTIONS TRULY RAISED ARE SO INSUBSTANTIAL AS TO NOT REQUIRE FURTHER ARGUMENT

The reasoning demonstrating the insubstantiality of any federal question similarly argues that, assuming jurisdiction, the order below should be affirmed without further argument. What is really appealed from is the determination of the Supreme Court of Arizona not to review the case by extraordinary writ, or "Special Action," but in the ordinary course of appellate review of civil proceedings.

Appellants' arguments addressed to the law of newspaper libel of public officials would seem beside the point until the merits of the case have received appellate consideration in the State of Arizona. The determination of the Arizona Supreme Court not to review them in a "Special Action" seems so unquestionably correct that no further argument seems to be required to justify its affirmation.

## CONCLUSION

Appellants are not here on a "final judgment." No issue of constitutionality of a state statute is involved nor is any substantial federal question raised. Accordingly, this Court has no jurisdiction to entertain this appeal. In any event, the questions really raised are so insubstantial that if jurisdiction is assumed, the order below should be affirmed without further argument.

Respectfully submitted,

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